

Quarterly Report
OF THE
ATTORNEY GENERAL
OF
ALABAMA



FOR THE PERIOD
FROM OCTOBER 1, 1970
THROUGH DECEMBER 31, 1970

VOLUME 141

MacDONALD GALLION, Attorney General

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Q U A R T E R L Y R E P O R T

of the

ATTORNEY GENERAL

of

A L A B A M A

For the Period

From October 1, 1970

Through December 31, 1970

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF
ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1970 through December 31, 1970, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION

Attorney General

MacDONALD GALLION

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OPINIONS

October 1, 1970

Honorable J. R. Pittard, Superintendent

Talladega County Board of Education

Office of the Superintendent

Talladega, Alabama 35160

Schools — County Boards of Education — Talladega County.
School buses must be sold or leased for an adequate consideration.

Opinion by Assistant Attorney General Madison.

Dear Mr. Pittard:

I have your letter of September 29, 1970, which is as follows:

"Our Board of Education has a request from the Talladega Rescue Squad asking that we make available to them a surplus school bus which we have taken off our regular school route. Ordinarily, we sell these used school buses to the highest bidder.

"Our Board of Education would like to provide the Talladega Rescue Squad with one of these used school buses without charge, provided we have the authority to do so.

"As we understand it, the Talladega Rescue Squad is chartered as a non-profit organization and, as you are aware, they render a service to the citizens of the county when emergencies exist. "It will be greatly appreciated if you will advise our Board of Education if we have the authority to make a school bus available to this organization without charge. I might point out that all of our school buses are purchased with local funds and not state funds."

The funds whether local or state are public school funds. Quarterly Report of Attorney General, Volume 130, page 30; **City Board of Education of Athens v. Williams**, 231 Ala. 137, 163 So. 659.

Surplus school buses purchased from public school funds come within the rule as declared in an opinion dated July 15, 1969, to Honorable Harvey D. Hagler, Superintendent, Dale County Schools. That rule is as follows:

"A county board of education has the authority to sell and convey its property when it is no longer needed for school purposes. It must do so, however, for an adequate consideration and on advantageous terms and to the best interest of education. Good business judgment should be used in making the sale. Quarterly Report of Attorney General, Volume 91, page 40."

The County Board of Education has no authority to part with the surplus school bus without adequate consideration.

If the school board leases the bus to the Rescue Squad which it may do, that, likewise, must be for a reasonable and adequate consideration for its use.

Yours very truly,

MacDONALD GALLION

Attorney General

October 1, 1970

Mr. Otha Lee Biggs

Clerk

Monroe County Commission

Monroeville, Alabama 36460

Bids — Contracts — Counties.

1. A "low bid" is an article's lowest unit price under the Competitive Bid Law.

2. Warranty and repurchasing agreements should not be used in computation of a "low bid," but these items may be considered in determining the "lowest responsible bidder."

Opinion by Assistant Attorney General Lawley.

Dear Mr. Biggs:

This opinion is in response to your letter dated July 21, 1970, which is as follows:

"Would you please answer the following question:

"Would the attached computation of low bidder shown on attached Sheet No. 2 be in compliance with the provisions of Act No. 217, Acts of Alabama 1967, as amended, otherwise known as the Competitive Bid Law.'"

Sheet No. 1 which is attached to your letter is an invitation, bid, and acceptance form. The pertinent parts are as follows:

"1. For furnishing the latest model front and Wheel Loader similar or equal to Caterpillar No. 950 with direct electric starting system. Equipped with 2¼ cu. yd. general purpose bucket approximately 96" in width with E. & L. shanks to take E. & L. points No. 25. Tires shall be 17.5 x 25-12 ply traction type.

"2. Less trade-in 1964 Lorain rubber tired front end loader, Model ML-225, Serial No. 3102, County No. 149-B.

"3. Less trade-in 1964 Lorain rubber tired front end loader, Model ML-225, Serial No. L3101, County No. 158-D."

Sheet No. 2 which is attached to your letter contains the following pertinent parts:

"A. A guarantee to _____ County that the total cost of repair parts and labor on this machine will not exceed \$_____ for the first three years or five thousand service meter hours whichever comes first, exclusive of cutting edges, teeth, tires, oil & grease, filters or any part caused by an accident that might damage the machine. All parts over this amount shall be guaranteed free of cost to _____ County until the expiration of the three years period.

"C. The Company agrees to repurchase this machine from _____ County at the County's option three years from date of delivery or after five thousand service meter hours which ever comes first for the sum of \$_____.

"COMPUTATION OF LOW BIDDER:

"The unit price amount of Item #1 minus (item #2 or item #3) plus amount shown in paragraph 'A' minus amount shown in paragraph 'C' shall constitute the low bidder."

I am of the opinion that your question must be answered in the negative. It is the purpose of the competitive bid law to produce the "lowest responsible bidder." A low bid is an article's lowest unit price which, in this instance, would be Item No. 1 minus either Item No. 2 or Item No. 3. Paragraph A on Sheet No. 2 is in the nature of a warranty by the bidding company. There is no way for such a company to definitely know in advance the amount of repairs that will be required on a particular article and a warranty of this type is more indicative of quality rather than price. Paragraph C is an agreement by the company to repurchase the article from the county. A repurchasing agreement such as this would not affect the lowest monetary unit at which the item would be available to the county since the true value of the item three years hence is impossible to determine at this time.

Both the warranty agreement in Paragraph A and the repurchasing agreement in Paragraph C have no effect on the article's lowest unit price. It is my opinion that they should not be included in the computation of low bidder. However, I am of the opinion that the warranty and repurchasing agreements may be considered under Title 55, Section 514, Code of Alabama 1940, Recompiled 1958, 1969 Cumulative Pocket Part, which requires that "awards shall be made to the lowest responsible bidder taking into consideration the **qualities** of the commodities proposed to be supplied." (Emphasis added.) Both of these items could affect the quality of the article purchased and therefore determine the

"lowest responsible bidder," but they are not determinative of the lowest unit price or "low bidder."

Very truly yours,
MacDONALD GALLION
Attorney General

October 14, 1970

Honorable Thomas J. Baber

Judge of Probate

Cleburne County

Heflin, Alabama

Elections—Ballots—Write-Ins—Rubber Stamps or Stickers.

1. Under the provisions of Section 162 of Title 17, Code of Alabama 1940, it is not necessary that a cross mark (X) be placed before the name of a person who does not appear on the ballot.

2. The voter must personally write in the name of the person on the ballot in the proper place thereon if the voter is capable of doing so and a rubber stamp or sticker may not be used for this purpose.

3. It is not necessary for a write-in candidate to qualify with any state or county official before offering as such candidate.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 29, 1970, is as follows:

"In the event that a person, otherwise qualified, offers as a write-in candidate in the general election, under the provisions of Title 17, Section 162, Code of Alabama, is it necessary that a cross mark (X) be made before the name of the candidate written in for the ballot to be counted, or is the writing in of the name sufficient?

"Also, we would appreciate being advised as to whether or not it would be legal for stickers, with the candidate's name and a cross mark (X) in front of his name to be placed by an elector in the proper space on the ballot, or must the candidate's name actually be written in by the elector?

"We would appreciate being further advised as to whether or not a write-in candidate is required to qualify with any State or County official before offering as such candidate.

"Your opinion concerning the above questions would be greatly appreciated."

In answer to your first question, your attention is directed to Title 17, Section 162, Code of Alabama 1940, which reads as follows:

"§ 162. To vote for person whose name is not on ballot.—If the elector desires to vote for any person whose name does not appear upon the ballot, he can so vote by writing the name in the proper place on the blank column."

This section is plain and unambiguous and admits of no construction. This section allows an elector desiring to vote for any person whose name does not appear on the ballot to write such person's name in the proper place on the blank column. It is completely silent as to placing a cross mark (X) before the name of a write-in and you are advised that this is not necessary.

This office has heretofore held in an opinion addressed to Hon. Frank B. Lloyd, Judge of Probate, Crenshaw County, found in Quarterly Report of Attorney General, Vol. 76, page 15, and in an opinion addressed to Hon. B. A. Reynolds, Judge of Probate, Dallas County, found in Quarterly Report of Attorney General, Vol. 125, page 16, that under the provisions of the applicable statutes to vote for a person whose name is not printed on the ballot, the voter must personally write the name of the person on the ballot in the proper place thereon, if the voter is capable of so doing, and a rubber stamp or sticker cannot be used for this purpose.

My answer to your third question is in the negative.

The applicable statute, hereinabove referred to, authorizes the name of a person to be written in on the ballot and it is not necessary that such person qualify with anyone in this regard.

Yours very truly,
MacDONALD GALLION
Attorney General

October 22, 1970

Honorable John F. Watkins

Executive Director

Alabama League of Municipalities

Post Office Box 1270

Montgomery, Alabama 36102

Banks and Banking — Corporations — Municipalities —
Officers and Offices.

1. A municipal governing body may designate as one of its official depositories a bank in which a member is a stockholder and director.

2. A member of a municipal governing body, who is a stockholder and director of a bank, may vote on the question of choice of depositories.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated September 2, 1970, is as follows:

"From time to time the question arises among our municipal officials relating to the choice of municipal depositories. In particular we are concerned as to whether or not a municipal council or commission may lawfully designate a bank as its depository when one of the members of the council is stockholder and director of such bank.

"We would appreciate very much your opinion on the following:

"1. May a municipal governing body designate as one of its official depositories a bank in which the mayor or one of its councilmen is a stockholder and director?

"2. In the event your answer to the first question is in the affirmative, would it be necessary for the municipal official who is a stockholder in such depository to refrain from voting on the question of choice of depositories?

"In view of the fact that this question does arise from time to time over the years and because there is some confusion in opinions of former opinions on this subject we would appreciate your earliest possible response in order that we may advise our members on this important question."

Title 37, Section 414, Code of Alabama 1940, reads, in part, as follows:

"No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury. . . ."

The management and control of municipal funds is vested in the governing body of the municipality. We find no statute which limits a municipal governing body in the choice of its official depositories.

This office has held, in construing statutes similar to Section 414, *supra*, that statutes do not prevent a municipality from dealing with incorporated firms which have as their officers or stockholders officials of such municipality. Quarterly Reports of Attorney General, Volume

128, page 30; Volume 117, page 52; Volume 111, page 44; and Volume 56, page 108.

Therefore, your first question is answered in the affirmative.

A member of a municipal governing body may vote upon any question considered by such body unless he is prohibited by statute from casting his vote. See **Hamrick v. Town of Albertville**, 219 Ala. 465, 122 So. 448. There is no statute which prevents a municipal official, who is a stockholder and director of a bank, from voting on the question of choice of municipal depositories.

Therefore, your second question is answered in the negative.

Very truly yours,
MacDONALD GALLION
Attorney General

October 22, 1970

Hon. Bill Gilbert

Tax Assessor

Chambers County Courthouse

LaFayette, Alabama

Taxation — Tax Assessors — Chambers County.

City owned property, though leased to private company,
is exempt from ad valorem taxes.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Receipt is acknowledged of your letter of October 9, 1970, addressed to the Attorney General and concerning the exemption of the City of LaFayette, Alabama from ad valorem taxes. You request an opinion from this office, as follows:

"I would appreciate your official opinion regarding the problem encountered by this office, which is stated below.

"1 — The City of Lafayette recently purchased a lot and building which they used for a short time to store equipment. This month they leased the property to a local individual who is using it for business purposes. (Furniture Store)

"Is the City of LaFayette exempt from Ad Valorem taxes on this property since it is used for private business and they are receiving rent for the property?"

"2 — Should the City of LaFayette be required to assess all their property exempt or otherwise, for the sake of recordkeeping with the Tax Assessor?"

Your first question is answered in the affirmative.

In the recent case of **State v. West Point Development Corporation** (1966), 280 Ala 100, 190 So. 2d 535, the City of Birmingham, Alabama leased for a term of years certain lands which it owned in the City to said private Corporation for the purpose of the Corporation erecting thereon a shopping center and which center was to be used by it as a private business enterprise for the term of the lease. Moreover, the buildings, upon the erection thereof by the corporation, were to become the property of the City. Under the circumstances, the Supreme Court of this State held that the lands and the buildings as the property of the city were immune from Ad Valorem taxation under the Constitution and laws of this State, notwithstanding the fact that the City received a substantial amount of rent under the lease, and the lands and buildings were used by the private Corporation for private business and for profit for the duration of the lease.

While the facts of **State v. West Point Development Corporation**, supra, may be somewhat different from those described by you, the principle as actually reiterated by the Court in that case that property owned by a city or municipal corporation, which is a political subdivision of the State of Alabama, is immune from Ad Valorem taxation under the constitution and laws of this State, regardless of the fact that the City rents or leases the property to a private business, concern which uses it for profit, is just as applicable to the City of LaFayette in your situation as it was to the City of Birmingham in said case.

Your second question is answered to the effect that it would certainly be a good business practice and a matter of readily knowing the tax status of property in the county, for the tax assessor to show on his records, where property is actually owned by the State or a municipal subdivision of the State, the fact that the property is so owned and is exempt for said reason from taxation. This practice is followed by a number of tax assessors in Alabama. However, I know of no provision of law that makes such a notation on the tax collector's records compulsory; and the fact that no such notation is made on the records does not affect the immunity of the State or City in this respect, as it is vested in them regardless under the Constitution and laws of this State.

Very truly yours,

MacDONALD GALLION

Attorney General

October 23, 1970

Honorable John L. Culver

Member of the State Legislature

Route 3, Box 166

Tuscaloosa, Alabama 35401

Taxation — Licenses — Trading Stamps — Property.
If no redemption center for stamps in county, store
itself may be considered as same.

Opinion by Assistant Attorney General Burton.

Dear Mr. Culver:

Receipt is acknowledged of your letter of October 8, 1970, addressed to the Attorney General and in which you request an opinion of this Office as follows:

"I would like your opinion on just what constitutes a 'Redemption Center.'

"The normal redemption center has all the merchandise for exchange for stamps under one roof or single location.

"The question:

"A firm sells and distributes stamps but does not have a redemption center.

"The stamps are redeemable at the various participating firms in merchandise sold by them and carried in stock.

"Is each firm considered a redemption center? Is each firm subject to the License Tax?

"It seems that one License Tax would cover the entire County as each firm is only a department of the redemption operation merely located under a separate roof."

Title 51, Section 606 (as amended by Act No. 1157 in 1969), Code, Recompiled 1958, levies the so-called Trading Stamps License as follows:

"Every person who engages in or carries on the business of issuing or selling to merchants, trading stamps, or any device or substitute thereof, or any stamps or certificates of like character which are to be given by merchants to purchasers of goods, wares or merchandise and which said stamps, certificates or devices, or substitute therefor, the person issuing or selling the same agrees to accept in payment for goods, wares,

and merchandise kept on hand by himself or another for redemption or for distribution by the person issuing or selling such stamps or certificates, shall pay to the state of Alabama a privilege or license tax " (Emphasis Supplied)

It will be noted that the license is due where the person issuing or selling the stamps agrees to redeem them with goods, wares, or merchandise kept on hand by himself or by another for the person issuing or selling the stamps. Therefore, if the person issuing or selling the trading stamps to merchants agrees to redeem the stamps in any type of goods, wares or merchandise kept on hand in the store by either him or the merchant, then, from the wording of the Statute itself and also from the doctrine of the case of **Family Discount Stamp Company of Georgia v. State of Alabama** (1963), 274 Ala. 314, 148 So.2d 611, the place where the stamps are so redeemed would constitute a place of business (a redemption center) on the part of the person selling or issuing the stamps to the merchants involved. Moreover, each such place of business, where the trading stamps are so redeemed by the person issuing or selling same or by the merchant from goods, wares and merchandise kept on hand by the merchant but where the redemption is made in behalf of such person, has been held to be a place of business or redemption center for which a separate license is due to be paid, even though situated in the same county in this State. **Family Discount Stamp Company of Georgia v. State of Alabama**, supra, 148 So.2d at page 613.

While the facts involved in the **Family Discount Stamp Company of Georgia** case are not exactly the same as those related by you in your request, the principles of that case appear to be equally applicable here. In the case of **Family Discount**, the merchants to whom it sold the pads of trading stamps displayed in their local stores a limited number of the premiums which were owned by Family Discount and customarily used to redeem the stamps. Also in some instances the stamps were redeemed in the store by the merchant delivering to the stamp holder one of the premiums on display in the store. However, the stamps in the great majority of cases were redeemed by the stamp holder choosing a premium from the catalogue published by Family Discount, and by the merchant sending the order to Family Discount at Macon, Georgia, and by it filling the order there and sending the premiums selected to the merchant who in turn delivered them at his local store to the stamp holder.

Under said facts, the Supreme Court of Alabama in affirming the decree of the Trial Court in **Family Discount Stamp Company of Georgia v State**, supra (148 So.2d at pp. 612 and 613), that the two local stores involved, where the stamps were redeemed by the merchant in behalf of the stamp company from premiums or merchandise kept on hand at said stores, constituted places where the stamp company did local business in this State or redemption centers (148 So.2d at page 612). Furthermore, that under Title 51, Section 606, as amended, supra, when read with Title 51, Section 831(a), Code, Recompiled 1958, that a trading stamp license under Section 606 was due for each of said places of

business or redemption centers, although the two stores involved were both located in Marshall County, Alabama.

In this respect the Court in the **Family Discount Stamp Company of Georgia** case, *supra*, (148 So.2d at page 613) said:

"This brings us to the question whether the stamp company is liable for a separate license for each of the two places in Marshall County, under the provisions of Code 1940, Title 51, Section 831(a), as amended, *supra* . . . In our view the Trial Court correctly held that a license is due for each place where the stamp company maintains a display of premiums from which redemptions were made in the manner disclosed by the evidence. Although the two places were not stocked with all premiums available, they were nonetheless places where redemptions were made and under the evidence, constituted fixed and established places of business maintained by the stamp company" (Emphasis Supplied)

From such criteria furnished by Section 606, as amended, *supra*, itself and from said decision of the Supreme Court of Alabama, I feel sure that you will agree that what would constitute a place of business on the part of the stamp company or a redemption center would depend on the facts in each case, and it would be impossible to give you a stereotyped definition that would fit all cases.

You state in the example described by you in your letter that the trading stamps sold by the stamp company are redeemed by the participating merchants from merchandise or inventories kept on hand by the merchant. It would, therefore, appear by your using the term "participating" that the merchants are participating in the program of the stamp company and are redeeming the stamps with such merchandise "kept on hand by them" for redemption "or for distribution by the person issuing or selling such stamps" Thus, each such place would constitute a place of business or redemption center in behalf of the stamp company under the Statute and also under the doctrine of **Family Discount Stamps Company of Georgia v. State**, *supra*, and the stamp company would be subject to the license for each such place, even though they might be located in the same county in this State.

The foregoing would be the case, if the stamp company agrees or is obligated in any way to redeem the stamps which it is selling with any type of merchandise or tangible personal property, or if it reimburses or pays the merchant in any way for the merchandise or tangible personal property used by the merchant in redeeming the stamps.

Very truly yours,

MacDONALD GALLION

Attorney General

October 27, 1970

Honorable Lee M. Otts

County Attorney

Escambia County

Brewton, Alabama 36426

Counties — Employment — Employers & Employees
— Funds — Gasoline & Gasoline Tax — Gasoline Fund
— Insurance — Opinions Overruled, Modified or Dis-
tinguished — Workmen's Compensation.

1. Counties may elect to come within provisions of the Workmen's Compensation Act in regard to their road employees.

2. Premiums for Workmen's Compensation insurance may be paid from the fund from which such employees are compensated.

3. Quarterly Report of Attorney General, Volume 8, page 287, modified to conform with this opinion.

Opinion by Assistant Attorney General Webb.

Dear Mr. Otts:

I have your request for opinion under the date of September 3, 1970 as follows:

"For several years now Escambia County has maintained Workmen's Compensation Insurance for the protection of its employees and the premiums for this insurance have been paid on a pro rata basis out of the same funds from which the salaries of these employees are paid, viz; the general fund, road and bridge, and gasoline tax fund. We have based this on an attorney general's opinion dated June 9, 1953, rendered to the Chairman of the Commissioner's Court of Elmore County and recorded in Vol. 71 on page 25 of the opinions of the attorney general. This opinion pertained to the county paying the premium on group, life, health, accident and hospital insurance and stated that the premiums for this insurance could be paid from any fund from which the employees were legally being paid. Of course, this opinion pertained to a different type of insurance, but we felt that certainly it would also cover Workmen's Compensation Insurance.

"One of the examiners has called to our attention that he does not believe that Workmen's Compensation premiums can be paid from any fund other than the general fund and he has cited us an opinion rendered September 22, 1937, to the Chairman of the County Commissioner of Russell County, said

opinion being reported in Quarterly Report of Attorney General, Vol. VIII, page 287.

"It is our opinion that the reasoning in the June 9, 1953 opinion is better than that in the 1937 opinion and that certainly this should be extended to cover Workmen's Compensation Insurance and that the 1937 opinion should be specifically overruled. We respectfully request your opinion concerning this matter."

There is no question but what the county has the authority to participate in the Workmen's Compensation Program and to carry insurance under this program. In this regard, your attention is invited to Title 26, Section 263, Code of Alabama, 1940, Recompiled 1958. See also Biennial Report of Attorney General, 1930 - 1932, page 160.

In the opinion of this office reported in Quarterly Report of Attorney General, Volume 8, page 287, cited by the Examiner and by you, this office held that counties may elect to come within the provisions of the Workmen's Compensation Act in regard to their road employees if the proper procedure is followed and that the premium on policies is payable out of the general and not out of the gasoline fund or road and bridge fund. The authority for fund restriction in this regard was cited as **Weaver v. Tidwell**, 228 Ala. 169, 153 So. 218. In an opinion of this office reported in Quarterly Report of Attorney General, Volume 71, page 25, it was held that a county governing body may establish a group life, health, accident and hospitalization insurance plan for its employees and pay all or any part of the premiums out of the fund from which the employees concerned are compensated. Authority for this holding is found in Title 28, Section 51 (1), et seq., Code of Alabama 1940, Recompiled 1958 (1969 Cumulative Pocket Parts). Section 351(3) of Title 28, supra, provides, in pertinent part, as follows:

"Such governing body shall have authority to pay all or such part of the premium for such insurance as such governing body shall determine **out of any available funds . . .**" (Emphasis supplied.)

Our Supreme Court has held that a Workmen's Compensation policy governing employees of the State Highway Department under authority of Title 23, Section 3, Code of Alabama 1940, Recompiled 1958, is a group accident insurance plan. See **Employers Ins. Co. v. Harrison**, 250 Ala. 116, 33 So. 2d 264; and **United States Fidelity and Guarantee Co. v. Dunlap**, 276 Ala. 616, 165 So. 2d 404. I am, therefore, of the opinion that the county may pay for Workmen's Compensation insurance out of the funds from which the employees are compensated, under the provision of Section 351(3), Title 28, supra, above quoted. Naturally premiums for those employees not compensated from the gasoline fund could not be paid from that fund. Amendment 93, Constitution of Alabama 1901.

The opinion in Volume 8 of the Quarterly Report, supra, relies on the holding of the Supreme Court in the case of **Weaver v. Tidwell**, supra.

This case held that where the county was granted authority by statute to pay a particular claim "out of the county treasury" such claim shall be paid from the general fund of the county and no other funds such as the road and bridge fund of the county may be used for this purpose. However, in my opinion, the **Weaver** case is no longer applicable to the situation at hand in view of the express provisions of Section 351(3) of Title 28, *supra*. Cf. **Johnson v. Robinson**, 238 Ala. 568, 192 So. 412. Quarterly Report of Attorney General, Volume 8, page 287, is accordingly modified to conform with the provisions of this opinion.

Very truly yours,

MacDONALD GALLION

Attorney General

October 28, 1970

Honorable W. P. Farrar

Tax Assessor

Russell County

Courthouse

Phenix City, Alabama

Taxation — Exemption — Cemeteries — Ad Valorem.
The exemption of cemeteries from ad valorem taxes and certain buildings built on or contiguous to lands used as a cemetery and various items in connection therewith discussed generally as to ad valorem exempt status.

Opinion by Assistant Attorney General Payne.

Dear Sir:

Your letter of October 3, 1970, requesting opinion of this office, reads as follows:

"I have a situation here in Russell County that I need an opinion on because of its peculiarity.

"Several years ago some men formed a corporation and bought one hundred acres of land and developed Memory Garden Cemetery. They built a small gate house that served as an office for the sale of cemetery lots. No other buildings were built. "In 1968 another group of men bought the stock of this corporation and took over the control of the business.

"In 1969 the new owners set out 3 acres of land and built a Funeral Home, Chapel and sales room for caskets, etc.

"We know that Cemeteries as such are exempt under Title 51, Chapter 2.

"My question is this:

"1. Will this 3 acres they have set out and built the structure on remain tax exempt as part of original cemetery?

"2. Will the Funeral Home and Chapel building be tax exempt?

"3. Will the inventory of caskets, etc., be tax exempt?

"4. Will the plant equipment be tax exempt?

"5. Will the corporation shares value be tax exempt?

"I will appreciate your immediate attention on this matter."

On August 3, 1965, the Counsel for the State Department of Revenue wrote an opinion to the Ad Valorem Tax Division of that Department relative to ad valorem taxation of "cemeteries." I think that opinion is a fair and correct interpretation of the constitutional provision involved and a proper construction of the statute concerning the exemption of cemeteries, and I, therefore, set out portions of that opinion here as follows:

"Section 91, Constitution of Alabama 1901, provides, in part, as follows:

" 'Sec. 91. The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries '

"Title 51, Section 2, provides, in part, as follows:

" '§2. Persons and property. — The following property and persons shall be exempt from ad valorem taxation and none other: (a) . . . all cemeteries '

"The primary questions to be resolved are as follows:

"1. Insofar as it relates to cemeteries, is the exemption provided for in section 91, supra, and Title 51, section 2, supra, applicable to personal property, including shares of stock?

"2. If the answer to the above question is in the negative and the exemption is applicable only to 'cemeteries' what does the word 'cemeteries' encompass?

"Similar questions were raised in two Missouri cases: **State ex rel. Mt. Mora Cemetery Association v. Casey**, 210 Mo. 235, 109 SW 1 and **National Cemetery Association of Mo. et al v. Benson**, 344 Mo. 784, 129 SW 2d 842, 122 ALR 893. In the **Mt. Mora Cemetery Association** case, the Court held that neither the character of a cemetery association exempting its ' . . . cemetery

. . . from all taxes so long as the same shall remain dedicated to the purposes of a cemetery . . . ' nor the constitutional provision exempting 'the property, real and personal, of the state, counties, and other municipal corporations, and cemeteries . . . , could be construed as granting an exemption of the cemetery's personal property. With reference to the constitutional exempting provisions the court stated: 'In that section the words, "the property, real and personal, of the state, counties and other municipal corporations," are separate from and have no connection with the words "and cemeteries," which follow. The exemption extends to "cemeteries" as such, but the section makes no reference to any kind of property in that connection.'

"In the **National Cemetery Association** case, the Court stated: " 'Article 10 of our Constitution pertaining to taxation and revenue under Section 6, states in part: "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation." An exemption from taxation can be sustained only when expressed in explicit terms and it cannot be extended beyond the plain meaning of those terms. The exemption intended here is to "cemeteries" as such. The word "cemeteries" is used independently of the balance of the sentence and the other words do not apply to or affect it. State ex rel. **Mount Mora Cemetery Association v. Casey**, 210 Mo. 235, 109 SW 1. The legislature has not expressed itself on this subject nor do we think that such is necessary before the exemption may be applied. We overule respondents' contention that this provision is not self-executing. We hold that, generally, constitutional provisions declaring that certain property shall be exempt are self executing and need no legislation to enforce the exemption. (1 Cooley, Taxation, 4th Ed. Sec. 650.)'

"While the provisions of Section 91, supra, are self-executing and no legislation was necessary, it is significant that the legislature did exempt 'all cemeteries' in Title 51, Section 2, supra, which indicates to me that the legislature considered the constitutional exemption to be applicable only to 'cemeteries' as such without any reference to personal property.

"What, then, does the term 'cemeteries' include? There are numerous cases wherein the courts have attempted to say what constitutes a cemetery under provisions of tax exemptions and the court in the **National Cemetery Association** case, supra, stated: 'As we have pointed out, no uniform rule as to what constitutes a cemetery under provisions of tax exemptions can be declared.' 6 Words and Phrases contains many general statements by courts as to what constitutes a cemetery such as:

" 'A "cemetery" is a place where dead bodies of human beings

are buried; area of ground set apart for burial of dead, either by public authority or private enterprise; cemetery includes not only lots for depositing dead bodies but also avenues, lots, and ground necessary for its use, or for shrubbery and ornamental purposes. In *re Hill Crest Memorial Gardens, Inc.*, W. Va., 119 S. E. 2d 753, 757.'

"There are many other cases referred to in Words and Phrases to the same effect.

"To include personal property in the exemption of 'cemeteries,' section 91 of the Constitution, *supra*, would have to be read as follows:

"The legislature shall not tax the property, real or personal, of . . . cemeteries '

"A cemetery is a place, a tract of land, a piece of property where dead bodies of human beings are buried, an inanimate thing which is not capable of owning anything.

"Based on the holdings in the two Missouri cases referred to above, it is my opinion that the exemption provided in section 91, Constitution of Alabama 1901, is applicable to cemeteries as such, the words 'cemeteries' being used independently of the balance of the sentence and the other words 'property, real or personal' not being applicable to it.

"Therefore, it is my conclusion that the exemption is not applicable to personal property used in connection with a cemetery.

.

"With respect to your questions concerning buildings, little authority has been found as to whether or not buildings located within the boundary of a cemetery are exempt under a statute or constitutional provisions which exempts 'cemeteries.' In an Annotation found in 168 ALR, page 297, reference is made to a Tennessee case and a Maryland case, as follows:

" 'And in *Forest Hill Cemetery Co. v. Creath* (1913) 127 Tenn. 686, 157 SW 412, the non-taxability of the cemetery company's realty having been determined, the court, by way of dictum, said: "Permanent improvements on the land, necessary to its use as a cemetery, are, of course, to be deemed exempt as parts of the realty."

"In appeal *Tax Ct. v. Baltimore Cemetery Co.* (1879) 50 Md 432, it was held that a charter exemption providing that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind" included not only the land but the gatehouses and other permanent improvements

thereon, the court reasoning that the land exemptions necessarily embraced the permanent improvements which were, in effect, a part of the realty and **essential** to the use of the land as contemplated in the charter.'” (Emphasis added.)

You will note that the immediate quote above indicates that certain permanent improvements on land used as a cemetery were held to be exempt in those cases cited. However, the improvements on the lands exempted were necessary to its use as a cemetery and improvements essential to the use of the land as contemplated were not subject to the tax. After studying these various situations, it is apparent that the Courts were referring only to such improvements as involved the lands used for cemetery purposes—that is to say, such improvements as houses or sheds or similar structures used to house and protect equipment used in the upkeep and necessary operation of the lands as a cemetery. It is well-known that various motor vehicles such as grass-cutting machines, and instruments used in the digging of graves, the hauling of dirt, etc., are used in the course of the cemetery operations. It follows, that it is essential and necessary to protect and preserve the equipment. The statutes involved must be construed in context with the subject matter therein. A funeral home is not a cemetery, and the fact that it is built contiguous to or on lands used as a cemetery would not change its character. Webster's New International Dictionary, Second Edition, page 1019, defines a funeral home or parlor as “Premises which may be rented for funeral ceremonies.” The same thought applies to a chapel. In Words and Phrases, Vol. 6A, pp. 634 and 635, it is stated “A ‘chapel’ in connection with a cemetery is intended as a place where burial **services** may be conducted.” (Emphasis added.)

It is common knowledge that funeral services are held in various churches, funeral homes and chapels far removed from the cemetery in which interment is to follow. As in the case at hand, the funeral home and chapel being built on lands of or those contiguous to the actual cemetery is certainly **convenient** but not **essential**.

The shares of stock of the corporation are owned, not by the corporation but by the shareholders. The Alabama Supreme Court has specifically ruled that the shares of a cemetery corporation are not exempt from ad valorem taxation but are taxed to the shareholder. **Ex Parte State in re The State v. Lovejoy**, 188 Ala. 401, 66 So. 1.

In view of what has been considered and set out above, your questions are answered in this manner:

1. As I understand it, the “3 acres” are not actually used as a cemetery at this time. Your facts state that the “new owners set out 3 acres of land.” On this land a funeral home, chapel and sales room for caskets were built, and, therefore, these lands cannot be considered as a “cemetery.” This question, therefore, is answered in the negative.

2. This question is answered in the negative—these structures, as

pointed out, may be convenient and desired but they are not essential. And, as pointed out, these structures do not fit the definition by any authority as being "cemeteries."

3. For reasons obvious, this question is answered in the negative.

4. This question is answered in the negative. The plant equipment is personal property and not within the contemplation of the Constitution of Alabama 1901 nor within the contemplation of Title 51, Section 2, *supra*, as pointed out above.

5. This question is answered in the negative for the reasons set out in the opinion.

In finality, after all various aspects of the question have been considered, it may be stated with some propriety that a cemetery is a place where:

"To whom life is heavy, the earth will be light."

Very truly yours,

MacDONALD GALLION

Attorney General

October 28, 1970

Honorable Thomas L. Hammons

Chairman, Limestone County Board of Revenue

Post Office Box 188

Athens, Alabama 35611

Counties—Officers and Offices—Judges of Probate—Supernumerary—Retirement.

Where probate judge may elect between retirement under State or county plan and supernumerary status, the four percent contributing factor need not be paid in under supernumerary act.

Opinion by Assistant Attorney General Turner.

Dear Mr. Hammons:

Your request for an official opinion, dated August 11, 1970, is as follows:

"Mason Freeman, Probate Judge of Limestone County, is interested in becoming a Supernumerary Probate Judge when he leaves office in January 1970.

"Under Act No. 606, 1969-1970 Special and Regular Session, Mr. Freeman can select to be supernumerary Probate Judge or retire under the county retirement system.

"We have been deducting 4% of Mr. Freeman's salary for the county retirement system, but have not been deducting 4% to be deposited in the general fund of the county as of the effective date of said Act which was August 29, 1969.

"The following questions have arisen:

"(1) Should we deduct 4% to be deposited in General Fund from effective date of act before Mr. Freeman is appointed Supernumerary probate Judge?

"(2) If so, do we continue to deduct the county retirement of 4% from his salary?"

It is my opinion that the answer to your question numbered one must be answered in the negative.

The contributing factor is outlined and established in Section 4 of Act. No. 606, Acts of Alabama, Regular Session 1969, page 1110, approved August 29, 1969. In that Section the last paragraph states that Section 4 shall not apply in any county in which the judge of probate is eligible to become entitled to any other State or county retirement or supernumerary act, which he may elect to come under.

Section 6 of the Act, provides that such an election need not be made until within sixty days after receiving the appointment as supernumerary judge of probate.

Having answered your first question in the negative, the second question is not considered.

Very truly yours,

MacDONALD GALLION

Attorney General

October 30, 1970

Honorable Sam W. Jones

Superintendent

Board of Education

Sumter County

Livingston, Alabama

Counties — County Boards of Education — Teachers.

A public school teacher may also be elected to and serve in office of profit.

Opinion by Assistant Attorney General McQueen.

Dear Mr. Jones:

I have your letter of recent date in which you state that two faculty members are candidates for election in the forthcoming election. You seek an opinion as to whether or not it will be necessary for these persons to resign their positions with the Board of Education of your county in the event they are elected.

This office in an opinion appearing in Quarterly Report of Attorney General, Vol. 115, page 13, held that a public school teacher is merely an employee of the county board of education and does not hold an office of profit within the meaning of Section 280, Constitution of Alabama 1901, and that such teacher may also hold the office of license inspector for the county as long as the duties of one do not interfere with the duties of the other.

This opinion is applicable to the situation presented by you. It is true that the probate judge of a county and a member of the county governing body hold offices of profit, but the prohibition in Section 280 of the Constitution is against holding two offices of profit at one and the same time, but is not a prohibition against holding an office of profit and other public employment.

A copy of the opinion referred to hereinabove is enclosed for your convenience.

If this office can be of further assistance, please do not hesitate to call upon us.

Yours very truly,

MacDONALD GALLION

Attorney General

November 12, 1970

Honorable Phil Smith

Chairman

Legislative Council

State Capitol

Montgomery, Alabama

Officers and Offices — Legislature — Alabama Legislative Council.

Members of Legislative Council continue to serve until successors are elected and qualified for membership.

Opinion by Assistant Attorney General Bookout.

Dear Mr. Smith:

This is in reply to your request for an opinion dated November 5, 1970 which is as follows:

"Act No. 239, 1967 Special Session of the Alabama Legislature amended the law providing for a Legislative Council. The only provision I find now in the law as amended concerning the term of office of Council members is the following sentence: 'The elected members of the Legislative Council shall serve during their term as legislators, or until their successors are elected as herinbefore provided.'

"I would appreciate it if you would answer for me the following questions:

"1. Do elected members of the Council elected in the past legislature, and who have been re-elected to the new legislature, continue to serve on the Council until new Council members are elected?

"2. Do elected members of the Council elected in the past legislature, but who are no longer members of the legislature, continue to serve on the Council until new Council members are elected?

"3. Does the Speaker of the House of Representatives elected in the past legislature continue to serve on the Council until a new Speaker is elected?

"4. Does the president pro tem of the Senate elected in the past legislature continue to serve on the Council until the election of a new president pro tem when he is no longer a member of the Senate?

"5. Does the Speaker pro tem appointed in the past legislature remain a member of the Council until the selection of a new Speaker pro tem?

"6. Do those who are members of the Council because of a committee chairmanship or vice chairmanship in the past legislature continue to serve on the Council until new committee chairmen or vice chairmen are selected:

(a) When such members are no longer members of the legislature? (b) When such members are still members of the legislature?

"Each of these questions is based on a specific factual situation concerning the Legislative Council. If you need any further specific facts, or other information, please advise."

Act No. 239, Acts of Alabama 1967, substituted the words "continuing legislative committee" for the word "body" in the first sentence of the Act. The Act further provides that, "the Legislative Council shall meet at least once each three (3) months." It also provides that, "The elected members of the Legislative Council shall serve during their term as legislators, or until their successors are elected as hereinbefore provided." The Act also states, "The Legislative Council may make temporary appointments to fill vacancies in its membership."

Article 4, Section 46, Constitution of Alabama 1901, provides that, "The terms of office of the senators and representatives shall commence the day after the general election at which they are elected, and expire on the day after the general election held in the fourth year after the election, except as otherwise provided in this Constitution."

One primary question to be resolved is whether a member of the Legislative Council may remain a member after his term of office as a legislator has expired.

It appears to this office that the clear intent of the Legislature in enacting Act No. 239, *supra*, was to provide for a continuing committee, which could continue to function and operate between terms of the the Legislature. The Legislative Council is, likewise, vested with certain duties and powers of a permanent and continuing nature such as supervision of the Legislative Reference Service. There is nothing in Act No. 239, *supra*, which would indicate the Legislative Council would cease to operate, or operate in a piecemeal fashion with only a part of its membership between the date of the general election and its new organizational session, special session or regular session.

There is no limitation spelled out in the Act that a member must remain a member of the Legislature, a committee chairman, or officer thereof during the interim between the general election and the next session of the Legislature. In construing acts of the Legislature, we must adopt a construction which gives workability to the act. We cannot assume that the Legislature intended to create a continuing committee and then subject to a piecemeal dismemberment. It therefore appears to us that the clear intent of the Legislature was that all the members of the Legislative Council remain on the Council until their successors are elected, qualified or selected for membership in session of the new Legislature as provided for in the Act.

Sincerely yours,

MacDONALD GALLION

Attorney General

November 12, 1970

Honorable Phillip J. Hamm

President

George C. Wallace State Technical Junior College

Napier Field

Dothan, Alabama 36301

Colleges and Universities — Schools — Bids.

Computer lease contracts may not be transferred but must comply with Bid Law.

Opinion by Assistant Attorney General Webb.

Dear Mr. Hamm:

I have your letter of October 23, 1970 in which you request my opinion as follows:

"Here at the George C. Wallace State Technical Junior College, we have an IBM 1401 Model 2 second generation computer which is under a rental contract. This contract is subject to cancellation at the school's prerogative, however, it may be terminated at any time by mutual agreement.

"There is a 360/20 Model 2 third generation computer system at the John M. Patterson State Technical School which was installed under the Alabama bid law. This equipment will bring our teaching facilities up to standard and is no longer needed at the John M. Patterson State Technical School due to the change in status of the school's system.

"I am requesting information as to whether I can cancel our contract with IBM on the 1401 second generation equipment, by mutual agreement, and transfer the 360/20 Model 2 third generation computer to our school, which is already under State bid, in compliance with the Alabama State bid law."

Under the provisions of Title 52, Section 509(96), Code of Alabama 1940, Recompiled 1958 (1969 Cumulative Pocket Part), control of the various state junior colleges and state technical schools is placed in the State Board of Education. However, purchasing procedures in compliance with the competitive bid law are prescribed by Title 55, Sections 506, Code of Alabama 1940, Recompiled 1958 (1969 Cumulative Pocket Part). Section 507, *supra*, provides in pertinent part:

"The said state trade schools, state junior colleges, state colleges and universities under the supervision and control of the state board of education . . . shall establish and maintain such purchasing facilities and procedures as may be necessary

to carry out the intent and purpose of this chapter by complying with the requirements for competitive bidding in the operation and management of **each such state trade school**, state junior college, state college or university under the supervision and control of the state board of education" (Emphasis supplied)

The provisions of Sections 506 and 507, *supra*, quite obviously intend the contracts at each of the state institutions under the state board of education to be let separately and in consideration of the requirements of that particular institution. A lease that is in existence and has been let for one trade school would not necessarily meet the requirements of another trade school and those bidding on the contracts for the requirements of one trade school might not for various reasons bid on the contracts for another trade school. By the same token a lease let, therefore, for the benefit of one institution when transferred or moved to another institution would constitute a new and different lease agreement, and I am, therefore, of the opinion that should your school desire new computer equipment the contract for lease of such equipment must be relet in full compliance with provisions of the competitive bid law, Title 55, Section 506, *supra*.

This opinion deals solely with the proposition of transfer of one lease agreement from one institution to another. It does not deal with the transfer of property which is already owned by the state, from one institution to another.

If I may be of any further assistance, please let me know.

Very truly yours,

MacDONALD GALLION

Attorney General

November 17, 1970

Honorable Wiley P. Henderson

District Attorney

21st Judicial Circuit

Post Office Box 301

Flomaton, Alabama 36441

Clerks of Circuit Courts—Criminal Law—Court Reporters—Costs and Fees—Habeas Corpus—Courts.

1. Where the State is unsuccessful on appeal of a Habeas Corpus Case, the fees of the Court Reporter and Court Clerk should be paid by the State.

2. Where the State is successful on appeal in a Habeas Corpus case and the costs are taxed against the original petitioner, there is no authority for payment of court costs by the State.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an opinion dated September 4, 1970, is as follows:

"Would you please render an opinion on how the court reporter's fee for preparing a transcript of the evidence and the clerk of the court's fee for his services should be paid when the State appeals the granting of a habeas corpus petition under Title 15, Section 369, whether the State be successful or unsuccessful on the appeal taken."

The statute to which you refer is Title 15, Section 369, Code of Alabama 1940, as amended by Act No. 60, Acts of Alabama 1955, page 294. This statute reads, in part, as follows:

" . . . Within thirty days from the date of judgment, the clerk of the court from which the appeal is taken shall forward a transcript of the record and a certificate of appeal to the supreme court or court of appeals, together with a transcript of the evidence and the judge's ruling thereon, which shall be certified to be correct by the judge or officer hearing the petition. The transcript of evidence shall be prepared by the court reporter, who shall be entitled to a transcript fee of fifteen cents for each one hundred words thereof, and for each carbon copy made at the same writing of five cents for each one hundred words thereof. . . ."

In the opinion reported in Quarterly Report of Attorney General, Volume 93, page 47, we advised that, because of the provisions contained in the above-quoted portion of Section 369, as amended, *supra*, the fees of the Court Reporter for transcribing testimony in a Habeas Corpus case where the State appeals should be taxed as a part of the costs in the case. We also held that when the State is unsuccessful, such fees should be paid from that part of the current General Appropriation Act which provides for court costs to be paid by the State of Alabama not otherwise provided for.

The fees of the Clerk of the Circuit Court for his services in preparing the transcript of record on appeal will, of course, also be taxed as a part of the costs in the case where the State takes the appeal as is true in all other cases.

Therefore, I am of the opinion that where the State appeals from a judgment granting a Writ of Habeas Corpus, the fees of both the Court Reporter and the Clerk of the Court should be taxed as a part of the costs in the case.

Where the State is unsuccessful on appeal, such costs should be paid from the appropriation mentioned hereinabove which is contained in the current General Appropriation Act, Act No. 995, Acts of Alabama 1969, page 1764. (See page 1800, Volume 2, Acts of Alabama 1969.)

Where the State is successful on appeal and the costs are taxed against the appellee, I find no provision authorizing the State to pay such costs.

Very truly yours,

MacDONALD GALLION

Attorney General

November 30, 1970

Honorable Melvin Bailey

Sheriff of Jefferson County

Jefferson County Court House

716 North 21st Street

Birmingham, Alabama 35203

Criminal Law—Sheriffs—Courts.

Original copy of arrest warrant must be presented for service.

Opinion by Assistant Attorney General Price.

Dear Sheriff Bailey:

Your request for an opinion of this office is as follows:

"We have a problem concerning warrants of arrest forwarded to us for execution by out of county officials. We do not know if we should require that the original warrant of arrest be forwarded to us or whether we can legally act on a certified copy of the warrant. We would, therefore, respectfully request a legal opinion on the following question:

"Must the original warrant of arrest be forwarded for out of county executions or will a certified copy of the warrant of arrest suffice?"

In my opinion a certified copy of an arrest warrant is not a sufficient basis for an arrest. The original should be presented with proper authorization for its being executed in a county other than that from which it has issued. See Title 15, Sections 163, 164 and 165, Code of Alabama 1940 (Recompiled 1958).

The power to arrest has always been closely regulated and controlled. The possibilities for abuse would be numerous and the public greatly endangered if tight controls did not exist. Title 15, Section 153, authorizing arrests with warrants speaks of "the warrant" and court decisions construing this section are worded in an equally restricted manner. See **Richards v. Burgin**, 159 Ala. 282, 49 So. 294 and **Adams v. State**, 175 Ala. 8, 57 So. 591.

Since the power to arrest has such far reaching possibilities the Legislature's statements on this power should be strictly construed. An inference that copies of warrants are sufficient when the statute makes no statement to that effect would not be proper. The statutes and cases speak of "the" warrant and a copy is not sufficient.

Cordially yours,

MacDONALD GALLION

Attorney General

December 9, 1970

Honorable T. Raiford Noland

Vice President for Business Affairs

Livingston University

Livingston, Alabama 35470

Colleges and Universities — Expenses — Livingston University — Schools.

1. Board of Trustees, instructors and employees of Livingston University when traveling on state business are subject to provisions of Act No. 470, Acts of Alabama 1969, page 912, even though expenses are paid from non-appropriated auxiliary funds such as athletic receipts.
2. Such persons when traveling outside the State of Alabama must have travel authorized in writing by the Governor as provided by Act No. 470, supra.
3. Student athletes, band members and cheerleaders not otherwise compensated for their services as employees are not subject to provisions of Act 470, supra, when traveling within or without the State of Alabama.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have your letter of November 18, 1970, in which you request my opinion as follows:

"In reviewing our internal procedures, relating to official travel performed by students and staff of Livingston University in connection with regular scheduled athletic events, some questions have arisen that need clarification. Specific cases are as follows:

"(1) Livingston University participates in four major sports—football, basketball, baseball, and track. Schedules of games are determined as far as a year in advanced, and are posted in various public places and reported in newspapers across the state. All four teams participate in games in and out of the state. Funds, used to operate our athletic programs, are derived from student activity fees, gate receipts, program and advertisement sales, sale of concessions, and donations from private individuals. Travel expenses for the players and coaches are paid from these auxiliary funds. We would like an official ruling as to:

"A. Is it necessary to request out-of-state travel permission from the Governor for the out-of-state trips made by our athletic teams?

"B. In connection with athletic food and lodging, would the per diem rate of \$15.00 per day apply to each individual player on the team for in-state travel, or may this cost be considered as an expense of operating the athletic program and paid in total?

"C. Our cheerleaders accompany the teams on all trips and our band accompanies the teams on some trips. Is it necessary for these groups to request out-of-state travel permission from the Governor? Travel expenses for the band and cheerleaders are paid from the Music Department's budget in the School of Arts and Sciences.

"(2) In addition to the team, band, and cheerleaders, other University officials, on occasion, have reason to make trips either with the team, or on behalf of Livingston University in connection with the specific athletic event. These persons are assigned by the President. For example, the Department of Public Affairs assigns a photographer and/or news writer to cover the athletic events. The President sometimes attends the events, both in and out-of-state, as an official of Livingston University. Also, other University officials, such as the Business Manager and Athletic Director, on occasion, incur travel on behalf of Livingston University in connection with these athletic events. Expenses for these trips would be paid from the general operating travel budget of the department in which the person is assigned. Is it necessary, in these instances where persons are traveling on behalf of Livingston University in connection with the athletic events, to request out-of-state permission from the Governor?

"Please give us an official ruling on these questions and expenditures. Your usual fine cooperation in this matter is appreciated."

In a prior opinion to Honorable A. W. Steineker, dated March 5, 1969, reported in Quarterly Report of Attorney General, Volume 134, page 34, we held the provisions of Title 41, Section 154, Code of Alabama 1940, as amended, to be applicable to colleges and universities and further stated:

"The above section controls the expense allowance of persons traveling in the service of the State, or any of its agencies unless there are acts relating to certain State agencies which effect a repeal of same insofar as those agencies are concerned, or make other provisions for the expense allowances in a different manner. Quarterly Report of Attorney General, Volume 16, page 7; Volume 32, page 45.

"The term 'traveling in the service of the State' is construed to mean travel by persons in carrying out their duties for the State. Quarterly Report of Attorney General, Volume 129, page 42.

"The statute, Section 154, *supra*, does not deal with the sources from which the expenses are paid, but instead deals with the amounts to be allowable to persons traveling in the service of the State of Alabama as its agents, etc."

Livingston University Board of Trustees is invested with those powers and duties prescribed by Title 52, Sections 509(129) through 509(141), Code of Alabama 1940, Recompiled 1958 (1969 Cumulative Pocket Parts). Section 509(136) of Title 52, *supra*, purports to grant to members of the Board of Trustees actual expenses incurred by them in the discharge of their duties as such trustees.

Title 41, Section 154 of the Code, *supra*, was repealed by provisions of Act No. 470, Acts of Alabama 1969, page 912, which has now been codified as Title 55, Sections 488(1) through 488(4), Code of Alabama 1940, Recompiled 1958 (1969 Cumulative Pocket Parts). Section 1 of Act No. 470, *supra*, purports to set the "maximum amount allowable to a person traveling inside the State of Alabama in the service of the State or any of its departments, institutions, boards, bureaus, commissions, councils, committees, or other like agencies, for expenses other than transportation" Section 2 of Act No. 470, *supra*, further requires that "persons traveling in the service of the State or any of its departments, institutions, boards, bureaus, commissions, councils, committees or other like agencies outside the State of Alabama shall be allowed all their actual and necessary expenses in addition to the actual expenses for transportation provided such travel shall have first been duly authorized in writing by the Governor."

This office has previously held that Act No. 470, *supra*, repealed all special acts insofar as they might conflict with the provisions of

this act. See opinions to Honorable A. W. Steineker, Chief Examiner, dated December 4, 1969 and December 23, 1969. I am of the opinion that such act also repeals Section 509(136) of Title 52, *supra*, and that the same is clearly applicable to the Livingston Board of Trustees, instructors and employees from whatever funds paid. Cf. Quarterly Report of Attorney General, Volume 134, page 34, *supra*.

A very important question raised by your letter is that of whether or not students are covered by provisions of Act No. 470, *supra*. I am informed by Examiner of Public Accounts that most colleges and universities pay to one employee an advance for travel expenses of the students such as football players, cheerleaders and band members and that such amounts are accounted for by the employee, and the college is billed at a later date for all hotel rooms used by the students. While I find no actual authority of law for an advance of funds for this purpose, and I express no view on this procedure, I do recognize that the students in most instances would be unable to finance travel and seek reimbursement on return. I also recognize that such students while rendering what may be entitled a "service" to the college are not compensated for such service and that the travel is a valuable part of the educational experience in pursuit of recognized educational programs. I am therefore of the opinion that such persons are not "traveling in the service of the State" as this term is used in Act 470, *supra*.

Having thus reached the conclusions set forth above, I answer your first question, parts A & C, in the negative as it regards the student, who is not an employee of the University, and I answer the same in the affirmative insofar as the employees and instructors are concerned. I answer part B of your first question that such expense for students may be considered as an expense of operating the athletic program and paid in total, assuming of course that all such expenses are reasonably necessary to the program. The limits of Act 470, *supra*, are not applicable to students. Your second question is answered in the affirmative. The funds from which the expenses are paid are not material to your questions.

If I may be of any further assistance in this matter, please let me know.

Yours very truly,

MacDONALD GALLION

Attorney General

December 17, 1970

Honorable Philip E. LeMoreaux

State Geologist

Oil and Gas Supervisor

Stat Oil and Gas Board

P. O. Drawer O

University, Alabama 35486

State Oil and Gas Board — Authority in Regulating
Sulfide Gas.

1. Under the provisions of Chapter 3 of Title 26 of the Code of Alabama 1940 (Recompiled 1958), the State Oil and Gas Board has authority to make and enforce reasonable rules, regulations, and orders regarding the handling and treatment of hydrogen sulfide gas which may be incidental to the production of crude oil and gas.

2. The State Oil and Gas Board has authority under the inherent police power of the State to make and enforce reasonable rules and regulations regarding the handling and treatment of hydrogen sulfide gas produced incidental to the production of crude oil or gas.

Opinion by Assistant Attorney General Barnes.

Dear Mr. LaMoreaux:

Your request for an official opinion dated November 11, 1970, is as follows:

"As you probably know, Alabama has recently had several highly significant oil and gas discoveries in the southern part of the state. Unfortunately, some of this production is accompanied by a gas, hydrogen sulfide.

"Hydrogen sulfide is an extremely noxious and corrosive substance which must be removed from the production stream before oil or gas can be marketed. In order to accomplish the removal of this substance, oil or gas must be transported from the well head to a central treatment plant. The corrosive character of the gas presents serious design problems in all phases of production, transportation, and treatment.

"Because of the vagueness of statutory provisions for dealing with this type of substance, the State Oil and Gas Board respectfully requests an official opinion from your office as to whether or not this Board has authority to prescribe rules and

regulations regarding the construction of facilities for the safe production, transportation, and treatment of this material.”

I am of the opinion that the State Oil and Gas Board has authority to make reasonable rules and regulations concerning the safe handling and treatment of hydrogen sulfide gas occurring incidental to the production of crude oil or gas.

Section 179(32) of Title 26 of the Code of Alabama 1940 (Recompiled 1958), covering the powers and duties of the Oil and Gas Board gives the Board jurisdiction and authority necessary for the conservation of oil and gas and the prevention of waste. This same section gives the Board authority to make reasonable rules and regulations to effectuate the oil and gas law.

Section 179(45) of this same title, while partly dealing with regulation of illegal oil or gas, continues and states that it is a violation for any person to transport, process or handle in any manner **any** oil or gas without complying with the rules and regulations of the Board; thereby implying sufficient authority of the Board to regulate oil or gas as said product is defined in Section 179(25) of said title.

Even though the statutes mentioned, *supra*, imply adequate authority of the Board to regulate the proper handling of hydrogen sulfide gas, the inherent police power of the State would, in my opinion, also allow this Board to take the necessary steps in protecting the public regarding this corrosive substance.

Very truly yours,

MacDONALD GALLION

Attorney General

I N D E X

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During the period covered by this Quarterly Report of the Attorney General, October 1, 1970, through December 31, 1970, the Attorney General rendered the following informal opinions. These opinions are not published in the Quarterly Report.

Subject	Addressee	Date	File No.
—C—			
CITY AND COUNTY BOARDS OF EDUCATION:			
Bid Law—Bonds	Norman N. Loper	Dec. 11	87
Board Member—Residence	Jesse N. Wood	Nov. 4	32
Construction—Appropriation	David M. Enslin	Nov. 4	54
Principal—Transfer	Paul R. Hubbert	Nov. 6	34
Teachers—Retirement	Hubert G. Hughes	Nov. 4	37
Teachers' Salary—Payment	Frank Earnest, Jr.	Nov. 4	38
COUNTIES			
Bids—Rejection	Charles R. Adair, Jr.	Oct. 9	18
Cars—Sale	A. Lamar Tanner	Oct. 20	48
Court Reporter—Expenses	Billy J. Duncan	Dec. 8	80
Court Reporter—Salary	B. J. McPherson	Oct. 13	49
Equipment—Sale	Norward K. Denney	Oct. 7	17
Funds—Private Roads	Woodrow J. Stephens	Oct. 28	44
Funds—Right-of-Way	David Brown	Oct. 7	25
Hospitals—Torts	H. W. Suddath	Oct. 23	39
Jailers—Employment	Conrad M. Fowler	Oct. 30	45
Officials—Salary	Bernard A. Reynolds	Nov. 11	1
Prisoners—Expenses	E. W. Enslin	Nov. 13	61

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COURTS:			
Bailiff—Duties	James Record	Oct. 2	13
Clerk's Deputy—Papers	J. D. Richardson	Oct. 2	12
Clerk—Salary	Eunice Blackmon	Dec. 18	96
Insurance Superintendent—Pending Cases	R. Frank Ussery	Oct. 7	Ins.
Jury Commission—Retirement Contribution	Elizabeth M. Young	Dec. 4	77
Merit System—Reclassification	E. R. Lindsey	Dec. 7	79
	—D—		
DISTRICT ATTORNEYS			
Suits—Surety Bonds	Earl C. Morgan	Oct. 1	Dist. Att.
	—E—		
ELECTIONS:			
Candidate—Qualification	Bernard A. Reynolds	Oct. 9	1
Illiterates—Assistance	Bernard A. Reynolds	Oct. 19	1
Illiterates—Assistance	James Hovater	Oct. 19	27
Registrars—Voter Lists	C. M. A. Rogers	Nov. 17	64
Secretary of State—Nominee Certification	Mabel S. Amos	Oct. 9	Sec. St.
	—J—		
JUDGES OF PROBATE:			
Documentary Tax—Additional Indebtedness	J. Paul Meeks	Dec. 29	95
Documentary Tax—Second Financing	Joe J. Phillips, Sr.	Dec. 23	93
Mortgage Tax—Maturity	Winford B. Smith	Oct. 5	14

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MUNICIPALITIES			
Annexation—Voting Wards	A. J. Coleman	Oct. 22	40
Attorney—City-County Job	L. H. Bodden	Nov. 5	41
Contract—Garbage	Arnold Tekes	Nov. 16	67
Contract—Sanitary Landfill	John Newberry	Oct. 6	8
Council—Powers	Joe H. King, Jr.	Dec. 11	86
Councilman—Appointment	Rutledge S. Thomas	Dec. 21	84
Court Bonds—Sale	Horace B. McLeod	Nov. 4	53
Employee—Appointing Director	John R. Phillips	Oct. 23	11
Employee—Appointment	Charles H. Younger	Oct. 19	9
Employees—Appointment	Grady M. Ellison	Dec. 11	85
Employees—City Manager	James K. Haygood, Jr.	Nov. 23	70
Employees—Reinstatement	L. R. Driggers	Nov. 11	57
Hospital Authority—Rentals	James G. Clower	Oct. 19	36
Licenses—Taxis	W. D. Walls	Oct. 20	33
Recorders Court—Game and Fish Law	E. B. Wheeler	Nov. 10	58
Regional Planning Commission—Petition	J. E. Mitchell, Jr.	Oct. 6	Ala. Dev. Office
Utility Board—Regulations	E. L. Hancock	Nov. 19	66
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OFFICERS AND OFFICES			
Clerk—Supernumerary Status	J. F. Vickery	Nov. 2	35
Judge of Probate—Supernumerary Status	T. C. Almon	Nov. 12	62
License Inspector—Coroner	John W. Starnes	Nov. 19	68
Legislator—Beginning Date	Mabel S. Amos	Nov. 5	Sec. St
Legislator—Justice of Peace	Daniel L. Kinsey	Oct. 1	6

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Prisoners—Work	A. B. Clark	Dec. 22	89
Sheriffs—Salary	M. M. Gibson	Nov. 12	60
Tax Collector—Retirement Contribution	Lewis Wilson	Oct. 9	16
—S—			
SCHOOLS:			
City Board—Retirement	Clyde M. Zeannah	Dec. 22	122
County Board—Contributions	William W. Carpenter	Oct. 14	15
County Board—Fees	John D. Woodyard	Oct. 6	5
County Board—Refunds	Guy S. Kelly	Dec. 23	88
Debts—School Principal	James A. Shepherd	Nov. 30	76
Employee—Relatives	D. A. Hudson	Oct. 5	10
Records—College Payroll	Walter J. Merrill	Oct. 16	21
Teachers—Sick Leave	Hugh H. Williamson	Oct. 1	23
Teacher Tenure	Paul R. Hubbert	Nov. 9	34
Trade School—Bids	A. S. Hosmer	Oct. 1	20
University of Alabama—Hospital	Maury Friedlander	Oct. 14	47
STATE BOARD OF EDUCATION			
Funds—Telegrams	Ernest Stone	Dec. 21	Ed.
Funds—Library Books	Ernest Stone	Dec. 10	Ed.
Teachers—Salary	Ernest Stone	Nov. 30	Ed.
STATE AND STATE DEPARTMENTS:			
Alabama Development Office— Engineer's Study	Phil Smith	Oct. 7	7
Alabama Development Office— Regional Commission	J. E. Mitchell, Jr.	Oct. 19	Ala. Dev. Office

Subject	Addressee	Date	File No.
Alabama Historical Commission— Publishing Contract	W. Warner Floyd	Oct. 7	Ala. Hist. Comm.
ABC Agents—Peace Officers	Spencer H. Robb	Oct. 21	ABC Bd.
Attorney General—Merit System	J. S. Frazer	Nov. 25	Personnel
Bids—Automobile Parts	Howard L. White, Jr.	Oct. 21	Finance
Bid Law—Mansion Fund	A. W. Steineker, Jr.	Nov. 12	Ex. Accts.
Building Commission—Industrial Relations Reimbursement	Hugh D. Adams	Nov. 19	71
Conservation—Bid Law	Joe Graham	Dec. 22	Conserv.
Conservation—Water Tests	Joe W. Graham	Oct. 20	Conserv.
Corrections Board—Insurance	William M. Fondren	Oct. 7	Bd. Corr.
Corrections Board—Leases	Albert P. Brewer	Dec. 4	Gov.
Engineers Board—Attorneys	Sarah E. Hines	Oct. 22	Eng. Bd.
Legislative Agents—Terms	John W. Pemberton	Nov. 12	56
Library Service—Bid Error	Elizabeth P. Beamguard	Oct. 16	Lib. Serv.
Library Service—Lot Purchase	Elizabeth P. Beamguard	Nov. 6	Lib. Serv.
Mental Health Board—Positions	Stonewall B. Stickney	Oct. 8	Mental Health
Mental Health Board—Vacancy	Stonewall B. Stickney	Nov. 12	Mental Health
Oil and Gas Board—Regulations	Philip E. LaMoreaux	Dec. 8	Oil & Gas Bd.
Pharmacists—Alcohol Sales	Leland M. Gardiner	Nov. 4	50
Pharmacy Board—Continuing Education	Dan A. Dennis, Jr.	Dec. 22	Bd. Phar.
Pharmacy Board—Inspectors Contract	Dan A. Dennis, Jr.	Dec. 22	Bd. Phar.
Physical Therapy Board—Nonresident License	Martha Bryan	Oct. 14	Phy. Ther.
Psychology Board—Licenses	William H. Simpson	Dec. 8	Bd. Psyc.
Public Service Commission—Water Utility	Carl L. Evans	Dec. 9	Pub. Serv.
Sports Hall of Fame—Appropriation	Frank House	Dec. 15	75

Subject	Addressee	Date	File No.
—T—			
TAXATION:			
Exemption—Municipal Ad Valorem	Emmett W. Lee	Oct. 21	22
Mortgage—Filing Tax	Ashford Todd	Dec. 9	81
Motor Vehicles (U.S.)—Ad Valorem Tax	James E. Witherington	Oct. 19	43
Nonprofit Corporation—Bus Tag	Ben Reeves	Dec. 3	74
Partnership—Deed Tax	Leland Enzor	Dec. 8	78
Tax Collector—Delinquent Fee	James R. Maxwell	Oct. 8	19
Tax Lien—Enforcement	Price M. Bryant	Dec. 14	94